

September 23, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Missouri Coalition for the Environment Foundation

Date of Filing: August 1, 2005

Case Number: TFA-0111

On August 1, 2005, Missouri Coalition for the Environment Foundation (MCEF) filed an Appeal from a determination issued to it on June 28, 2005, by the Oak Ridge Office of the Department of Energy (OR) in response to a request for documents that MCEF submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/OR perform an additional search for responsive material.

I. Background

During February 2005, the Advisory Board on Radiation and Worker Health (ABRWH) held a meeting in St. Louis, Missouri.¹ At that meeting, officials from Oak Ridge Associated Universities (ORAU) and National Institute for Occupational Science and Health (NIOSH) discussed the contents of six boxes. These boxes contained material related to the pending Special Exposure Cohort (SEC) petition for the Mallinckrodt Chemical Works (MCW) site that was in operation in Missouri from 1942 to 1957. Letter from MCEF to OHA (August 1, 2005) (Appeal) at 1. According to MCEF, during the meeting the officials described the contents of the six boxes as declassified Mallinckrodt records from the Oak Ridge Institute for Science and Health (ORISE) vaults that were transferred to the OR vaults, records which “might materially affect the deliberations” of ABRWH on the MCW petition. *Id.*

¹The ABRWH is sponsored by the National Institute for Occupational Science and Health (NIOSH), part of the Centers for Disease Control (CDC). NIOSH is responsible for conducting research and making recommendations for the prevention of work-related illnesses and injuries. ABRWH is chartered to advise the Secretary of the Department of Health and Human Services about guidelines for implementing the Energy Employees Occupational Illness Compensation Program (EEOICPA). *See* Meeting Minutes, Savannah River Site Health Effects Subcommittee Meeting, CDC (March 13, 2003).

On March 10, 2005, MCEF filed a FOIA request with OR for various records regarding MCW. Letter from MCEF to OR (March 10, 2005) (Request).² There were three parts to the request. First, MCEF asked DOE for an index of the complete contents of the six boxes (Request 1). The second request was for an index of documents in the ORISE vaults pertaining to MCW operations that were or will be declassified before being placed in the six boxes mentioned in Request 1. The third request was for an index of any and all MCW classified documents that currently reside in ORISE or OR vaults.

OR conducted a search and found documents responsive to Request 1, but found no material that was responsive to the other two requests. Letter from OR to MCEE (June 28, 2005) (Determination Letter). MCEF contends that the search conducted by DOE was inadequate and untimely, that the portion of the determination addressing the responsive material ignored the key element of Request 1, and that the response to the second and third requests was “equally brief, vague and uninformative.” Appeal at 2. MCEF stated that it expected “specific statutory exemptions to be cited as to why the requested indexes to MCW related documents and about classified and declassified records were not provided in a more timely manner.” Appeal at 2. In the Appeal, MCEF challenged the adequacy of the search and asks OHA to direct OR to search again for responsive information.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (1988).

The OR FOIA Officer informed us that upon receipt of the request, she contacted DOE records managers, contractor records custodians, ORISE contractor personnel and DOE/OR classification

² MCEF also filed the request with ORAU and NIOSH because it did not know the “exact current location of the records.” Request at 1.

personnel to identify any responsive material. Electronic Mail Message from Amy Rothrock, OR to Valerie Vance Adeyeye, OHA (August 22, 2005). She is familiar with NIOSH review activities at OR over the last ten years, and prior to completing the OR determination letter, discussed the complexity of the search and her knowledge of the documents in the Mallinckrodt boxes with the requester. *Id.* According to the FOIA Officer, DOE was unable to identify the six boxes that MCEF wanted to locate and concluded that a NIOSH representative would have more information. *Id.* She then provided the requester with all indices and all search terms aids available for all Mallinckrodt documents held at OR. *Id.* NIOSH, on the other hand, also received the request but was able to accurately identify the responsive six boxes. In response to the request, the CDC FOIA Officer sent MCEF a summary of the types of information in each box and a list of the contents of each folder in those boxes entitled “List of Documents Found in the Mallinckrodt Boxes.” *See* Letter from CDC to MCEW (April 25, 2005). Despite this information, MCEF stated that CDC/NIOSH had provided only “one version” of an index to the records, and it wanted a DOE index to confirm the accuracy of the CDC/NIOSH index. Appeal at 1.

After reviewing the record of this case, we find that OR conducted a search that was reasonably calculated to uncover the requested information. OR searched all records in DOE’s possession but found none that were responsive.³ Nonetheless, in response to Request 1, OR provided the requester with additional information that it believed MCEF could use in conjunction with the NIOSH index. Electronic mail message from Amy Rothrock, OR to Valerie Vance Adeyeye, OHA (August 22, 2005). The FOIA does not require OR to create a DOE version of the NIOSH index for the convenience of the requester. As for the remaining requests, OR searched but did not find the other indices that MCEF requested. Further, MCEF has not provided any evidence that these documents exist, and the FOIA does not require OR to generate new documents in response to a request. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Missouri Coalition of Environment Foundation on August 1, 2005, OHA Case Number TFA-01111, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in

³ The FOIA Officer explained that the final response was delayed as a result of coordinating the search across four separate offices and repositories and for clarification of the scope of the search. Electronic mail message from Amy Rothrock, OR to Valerie Vance Adeyeye, OHA (August 22, 2005). OR also has a backlog of 460 FOIA requests and processes the backlog on a “first in, first out” basis. *Id.*

which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 23, 2005